Filed 5/11/10 P. v. Higgins CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A122524**

v. **(Alameda County Super. Ct. No. 155753B)**

PATRICK JAMAL HIGGINS,

Defendant and Appellant.

_____/

Patrick Jamal Higgins appeals from a judgment entered after a jury convicted him of first degree felony murder. (Pen. Code, §§ 187, 189.)[1] He contends his conviction must be reversed because (1) it is not supported by substantial evidence, (2) the court erred when it refused to exclude a pretrial statement that he made, (3) the court erred when it denied his *Batson*/*Wheeler*[2] motion, and (4) the sentence he received was cruel and unusual punishment. We will reject these arguments and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was convicted of first degree felony murder for participating in a robbery in which the victim, Joseph Briggs, was killed.

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[1] Unless otherwise indicated, all further section references will be to the Penal Code.

[2] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

Briggs and Michael Tafoya were friends and heroin addicts. They typically bought their heroin from a dealer named "Mike" in Oakland.

On February 16, 2006, Briggs and Tafoya drove to Oakland to buy heroin from Mike. They parked Brigg's car on 94th Avenue near East 14th Street and went into a liquor store on East 14th Street to get some food.

Tafoya stepped outside onto East 14th Street to buy the heroin. He told Briggs he should remain in the store because it was dangerous outside. A couple of minutes later, Briggs called Tafoya and told him he was walking to the car. In the middle of the conversation, the line went dead.

Tafoya immediately ran toward Brigg's car. After just a few steps, he saw three young African American men running from the direction of 94th Avenue. As Tafoya turned the corner from East 14th Street onto 94th Avenue, he saw Briggs on the ground about 30 feet ahead. His pockets were turned inside out and his wallet and cell phone were gone. Tafoya shook Briggs and called his name, but he got no response. Tafoya loaded Briggs into the car and drove him to a hospital where he was pronounced dead.

Police investigating the crime identified appellant as a possible suspect. They arrested him and brought him in for questioning on May 12, 2006. Appellant initially denied being at the scene of the crime or knowing anything about the robbery and murder of Briggs. But later appellant admitted he was on East 14th Street with a friend named Alfred Roberts and others when Briggs came up and asked if anyone had heroin. Someone told Briggs to go around the corner. He did.

After Briggs left, Roberts said to appellant, "We gonna get him." "He may have some money on him." Roberts told appellant to stop Briggs. Appellant agreed. He stopped Briggs and started talking to him. As he did, Roberts hit Briggs in the jaw. Briggs spun, hit a wall, and fell to the ground as if he was asleep. Roberts then went through Brigg's pockets and took his wallet. Appellant also went through Brigg's pockets but he could not find anything.

Based on these facts, an information was filed charging appellant with first degree felony murder. The case proceeded to trial where a jury convicted appellant as charged. Subsequently, the court sentenced appellant to 25 years to life in prison.

II. DISCUSSION

A. Sufficiency of the Evidence

Appellant contends his conviction must be reversed because it is not supported by substantial evidence.

Our role when evaluating this type of argument is "a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]'" (*Ibid*., quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.)

Here, appellant bases his argument on the principle that to convict a person of felony murder, there must be evidence that the killing was actually committed by one of the participants in the felony. (*People v. Washington* (1965) 62 Cal.2d 777, 781.) Appellant contends the evidence presented in this case was insufficient to support the conclusion that either he or Roberts inflicted the blow that killed Briggs. We are not persuaded.

Appellant admitted to the police that he and Roberts intended to rob Briggs. Appellant also admitted that during the robbery, Roberts hit appellant in the jaw causing him to fall to the ground. The doctor who performed the autopsy on Brigg's body

testified that Briggs died as the result of a hemorrhage to an artery on the back of his neck. The doctor said the injury could be have been caused by a punch to the head. The jurors considering this evidence reasonably could conclude that Briggs was killed by the blow to the jaw that Roberts inflicted.

Appellant contends the evidence was insufficient because it was "far from clear" that Briggs "[i]n fact" died as a result of the punch that Roberts threw. Rather, appellant maintains that the evidence "strongly suggests" that Briggs was killed by kicks and blows that were inflicted by other unidentified individuals *after* he and Roberts robbed Briggs.

We reject this argument for two reasons. First, the evidence appellant cites does not definitively prove that a second post-robbery beating in fact occurred. For example, appellant cites evidence from a witness, Steve Lewis, who told police on the night of the crime that he saw as many as eight people kicking a person who was on the ground. However, Lewis recanted his statement at trial and he denied telling the police that he saw anyone being beaten. Appellant cites his statement to the police that Briggs began "snoring" after being punched by Roberts. He argues that if Roberts's blow was fatal, Briggs would have not been snoring. Although, the doctor who performed the autopsy said the type of injury Briggs suffered would not cause immediate death. Some persons will die within three to five minutes. Others will live an even longer period of time. Thus, even if we were to assume that Briggs was snoring after being hit, that did not rule out the possibility that Briggs was killed by the blow Roberts threw. Appellant cites evidence from the autopsy that indicated Briggs suffered many injuries including some to his head and face. However, the doctor who performed the autopsy said he had no way of knowing precisely when those injuries were inflicted and that they could have occurred as many as three days before Briggs's death. In sum, the evidence that a second beating occurred was, at most, equivocal.

Second and more importantly, even if we were to assume that a second post-robbery beating did occur, that would not undermine the judgment. As we have said, the issue on appeal is whether the record contains substantial evidence from which a reasonable trier of fact could have found the essential elements of the crime proved

beyond a reasonable doubt, and that standard has been met here. The fact that the record also contains other evidence that might have supported a different conclusion is irrelevant. (*People v. Castro* (2006) 138 Cal.App.4th 137, 140.)

We conclude the judgment is supported by substantial evidence.

B. Admissibility of Evidence

Appellant was arrested and brought in for questioning on May 12, 2006. He was placed in a room around 11:15 a.m. and questioning began about three hours later. It was conducted by Sergeant Louis Cruz and Sergeant James Morris. They started by providing appellant his *Miranda* rights. Appellant waived his rights and he signed a written waiver form. The questioning then took place in two sessions over the next five hours. The first session lasted about three hours and fifteen minutes. The first few minutes of the first session were recorded, however, Sergeant Cruz noted it was difficult for appellant to talk about the incident, so he turned the recorder off and the questioning continued. Cruz then turned the recorder on surreptitiously about an hour and forty-five minutes later. The final hour of the first session was again recorded. After the first session ended, there was an hour and thirty minute break. Then there was a second session that lasted just a few minutes. The entire second session was also recorded. At the conclusion of the questioning, appellant was released.

During the questioning, appellant initially denied knowing anything about the robbery and murder of Briggs. But appellant later admitted he and Roberts were both there, that Roberts hit Briggs in the jaw, and that he patted Briggs down. Appellant denied, however, that he and Roberts had discussed the robbery ahead of time. Still later, appellant admitted that he and Roberts had discussed robbing Briggs ahead of time, and that he stopped Briggs hoping to get money from him.

Prior to trial, appellant filed a motion to suppress his statement to the police arguing they were involuntary. The trial court conducted a hearing on the motion where it listened to all three tapes of the questioning. The court also heard testimony from Sergeant Cruz and appellant, both of whom provided their version of the questioning that had occurred. At the conclusion of the testimony the court denied the motion to suppress

explaining its decision as follows: "The *Miranda* warnings were given to him. He said he understood them and he signed them, so I don't see any evidence here of any involuntariness. So the motion that this statement be suppressed is denied. The statement will not be suppressed. The Court finds that he freely, voluntarily, knowingly, and intelligently gave that statement to the officers."

Appellant now contends the trial court erred when it denied his motion to suppress.

The prosecution is precluded from using a confession that is involuntary. (*People v. Holloway* (2004) 33 Cal.4th 96, 114.) Both federal and state courts determine whether a confession is voluntary by applying a "totality of circumstances" test. (*Ibid.*) The question is whether the defendant's choice to confess was not "essentially free" because his will was overborne. (*Ibid.*) On appeal, the trial court's factual findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. (*Ibid.*) However, whether a confession is voluntary is a question of law that this court decides de novo on appeal. (*Ibid.*)

Here, appellant contends his statements to the police were involuntary in two respects. First, citing passages from his questioning by Sergeant Cruz and Sergeant Morris, appellant argues that he was "led . . . to believe that, if he confessed his full involvement, he would not be charged with a homicide and, most likely, would not be charged at all."

"It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, '[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, 'if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the

police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible . . . .'" (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, quoting *People v. Hill* (1967) 66 Cal.2d 536, 549; overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17.)

We conclude the officers conducting the questioning here did not cross the line from proper exhortations to tell the truth into impermissible threats of punishment or promises of leniency.

First, appellant relies on a passage during the first session that occurred just after he admitted he patted Briggs down as he was lying on the ground. Appellant told the sergeants he did not take anything from Briggs and he was reluctant to say whether Roberts took anything either. The sergeants questioned him on those points as follows:

"[Sergeant Cruz]: No, it don't sound right at all, you know? You're lookin in the man's pockets. We know he's got money. His partner says they got there with the money, okay, to buy heroin. You know, they admit that . . . he admits that. He admits what that money was there for, okay? He admits that money was there to buy heroin. Who got the money, okay? Like my partner's sayin' . . . we have come this far, okay? To stop now, you know . . . it's like you're hidin' somethin' that's huge. It's like you're hidin' somethin' that's huge. And folks are gonna wonder, well, how can . . . how can we believe him about this other stuff, when he's hidin' somethin' so big? When he's hidin' a pink elephant in the room? Everybody sees it. Everybody sees it, okay? Everybody sees it.

"[Sergeant Morris]: And *we ain't even trippin' over it*.

"[Sergeant Cruz]: No.

"[Sergeant Morris]: We're just (inaudible)

"[Sergeant Cruz]: --*It's not what killed him*.

"[Sergeant Morris]: No, exactly.

"[Sergeant Cruz]: It's not what killed him, okay? But it goes to your credibility, okay? It goes to you credibility." (Italics added.)

Relying on the portions of the passage above that we have italicized, appellant argues that the "implication" from the "trippin" comment was that he "should feel free to admit his involvement in the robbery, since even the police themselves were unconcerned about it." Appellant argues the "It's not what killed him" comment "implied that [he] would not be charged with murder, since his conduct was not what killed Briggs." We reject both arguments.

It is not entirely clear what the "trippin" comment meant in context, but it cannot reasonably be interpreted as appellant suggests. Sergeant Cruz repeatedly described the robbery and appellant's possible involvement in it as "huge" and "big" and the "pink elephant in the room." Read in context, those comments would have to convey to appellant that the sergeants were keenly interested in the robbery and appellant's possible involvement in it. They could not reasonably have been interpreted to mean that the sergeants were unconcerned about the robbery.

As for the "[i]t's not what killed him" comment, it falls far short of expressing a promise of lenient treatment in exchange for cooperation. The sergeants did not represent that they, the prosecutor, or the court would grant appellant any particular benefit if he told them the details of the robbery. To the extent the comment implied that it would work to appellant's advantage if he told the truth, they did nothing more than explain to him the benefits that might "'flow[ ] naturally from a truthful and honest course of conduct.'" (*People v. Jimenez, supra*, 21 Cal.3d at p. 612, quoting *People v. Hill, supra*, 66 Cal.2d at p. 549.)

Appellant also relies on a portion of the first session where Sergeant Cruz tried to discuss with appellant who else may have participated in the robbery:

"Q. All right. I wanna go back to where this guy falls against the wall and then collapses down, okay? There's another thing that we gotta talk about here, dude, okay? Remember we talked about neighbors, and we talked about people on the street, okay? You know . . . I do believe . . . that even [Roberts], when he hits [the] dude . . . how many times does he hit him?

"A. Once.

"Q. One time?

"A. One time. Once.

"Q. I do believe . . . that when he hits him, it's just to rob him. It ain't to kill him. I do . . . I do *firmly believe* that, okay? It's just to rob him. It's not to kill him, okay? But . . . these are the things we gotta answer right now, Pat. Things that I gotta explain to the D.A. And here's the things I gotta explain about: People are saying – people in that 'hood there are seeing—and other people who are standin' near the smoke shop—are also seeing you, and others—doin' some things." (Italics added.)

Focusing on the "firmly believe" comment we have italicized, appellant accuses Sergeant Cruz of trying to "downplay the importance of Briggs' death . . ." Appellant contends that comment "looks suspiciously like an assurance that this was only a robbery investigation and not a homicide case." We simply disagree with appellant's interpretation of the record. Read in context, the thrust of the comment is clear. Sergeant Cruz was acknowledging that when Roberts hit Briggs, he probably did not intend to kill him. He only intended to rob him. That straightforward comment cannot reasonably be interpreted as an effort to "downplay" Brigg's murder, nor can it be interpreted as an assurance that this was only a robbery investigation and not a homicide case.

Appellant's next argument is based on comments Sergeant Morris made during the first session when he was trying to determine whether appellant and Roberts had discussed robbing Briggs before the actual crime.

"Q. [Sergeant Morris]: What my partner's tryin' to tell you in so many words is that this thing is too well-orchestrated for it to be haphazard. In other words, the way this whole thing is goin' down, we believe it happened the way it happened. And that was, this guy walks up . . . he's not from the neighborhood, obviously . . . guy walks up, 'Go around the corner.' Well, who said it? If you didn't say, then [Roberts] said it. If [Roberts] didn't say it, somebody said it. And it seems like you're still hidin' little tidbits from us. So in other words, if I'm standin' on the cor – well, just hear me out before you start shakin' your head . . . 'cause I used to be a robbery investigator, and so was my partner.

"[Sergeant Cruz]: Yeah.

"[Sergeant Morris]: We're standin' out there . . . dude walks up . . . 'Go around the corner.' Well, if it wasn't—and we know that's not the heroin spot right there. The heroin spot is a little further down. And that guy—they sell crack there, obviously . . . they sell weed there. They don't sell (inaudible) right there. So when he went around the corner, was the . . . the intent was, 'Okay, let's go around and rob this guy.' *That's the whole . . . the whole issue here is about a robbery—it's not about a homicide . . . it's not about a murder.* The guy goes around the corner . . . it sounds like somethin' was said . . . like [Roberts] could a said something to you, hey, whatever. Whatever that conversation was, we need to know about it." (Italics added.)

Appellant suggests the comment we have italicized would have conveyed the message to appellant that because this was a robbery investigation, he did not need to worry about being charged with murder. Again, we think appellant has misread the record. Sergeant Cruz did not state nor did he imply that appellant did not have to worry about being charged with murder. He simply acknowledged the likely fact that when the plan to rob Briggs was hatched, the intent was simply to rob. The comment appellant challenges could not reasonably have been interpreted as he suggests.

Appellant's final argument on this point is based on a portion of the first session where Sergeant Cruz and Sergeant Morris were questioning appellant about whether he and Roberts had discussed the robbery ahead of time. The sergeants openly doubted appellant's claim that there was no prior discussion.

"Q. [Sergeant Morris]: . . . I mean . . . me and little dude work together enough to know when people ain't bein' truth. Just like him and his wife can talk without talkin'. They can look at each other in a restaurant and just, you know . . . they can look at each other in a crowded elevator and talk without talkin'. You and [Roberts] have been around since you were little.

"[Sergeant Cruz]: Yeah.

"[Sergeant Morris]: You know what he's gonna do even before he does it sometimes. But before we get into all that semantic, hey, man, what happened? Just tell

us what happened. We need to know the truth. That's what he's tryin' to get you to say, man. We like pullin' teeth now. We got the elephant out there. We tryin' to get the little—the little piece—the gnats now—the little pieces of it.

"[Sergeant Cruz]: *As scared as you are of the truth, man . . . as scared as you are of the truth . . . it's the truth, okay, that's gonna help us make a decision about you*.

"[Sergeant Morris]: *Exactly. A major decision*." (Italics added.)

Appellant contends the portion of the passage we have italicized "suggested" that "if appellant told [the sergeants] what they wanted to hear, he would be permitted to go home and would not be charged at all." We are not persuaded. The sergeants told appellant that the "truth" would help them make a decision about him. They did not say or suggest that if appellant told the truth, we would be permitted to go home or that he would not be charged. Appellant has read far more into the comments in question than is reasonable.

We conclude none of the comments appellant has identified can be interpreted to render his statements involuntary.

Appellant's alternate argument on this point is what he describes as a "straightforward 'totality of the circumstances' analysis . . ." He contends his statement must be deemed involuntary because at the time of his arrest he was "just" 20 years old, his stature was slight, he was "still living with his parents," he had dropped out of high school in the 10th grade, and that he had "little experience" with the criminal justice system. Appellant also complains that during his "eight hours in police custody" he was kept in two small rooms, "interviewed three separate times, handcuffed to a table for at least part of the time, never offered either food or water, and given just one short break to go to the bathroom and smoke a cigarette." Finally, appellant complains that Sergeant Cruz denied his request to make a phone call.

None of these facts, either alone or in combination, convince us that appellant's statement was involuntary.

While appellant was "just" 20 years old, he was an adult. Appellant's build may have been relatively slight, but it was not out of the ordinary. The point is minor.

Appellant has not cited any case that holds person's living arrangements to be pivotal. Indeed, in these days of economic distress, it is not unusual for a young adult to live with his or her parents. While appellant was a high school dropout, the transcripts of the interviews indicate he was able to interact with his questioners intelligently. Appellant did not have extensive prior contact with the criminal justice system, but he was no neophyte. He had been arrested on two prior occasions. Appellant might have been in custody for eight hours, but his actual questioning was much shorter. The initial session was only about three hours and fifteen minutes and it was followed by an hour and forty-five minute break. The second session was only minutes long. While appellant was handcuffed after he was taken into custody, the handcuffs were removed once the interviews began. It is true that appellant was not offered either food or drink, but it is also true that appellant did not ask for either. Indeed, when appellant asked if he could smoke a cigarette, he was allowed to do so. As for the phone call request, we do not view it to be pivotal. Appellant was under arrest and he was being questioned in a murder investigation. The police were not required to immediately comply with his every demand.

After evaluating the totality of the circumstances, we conclude appellant's statements to the police were not involuntary. The trial court correctly denied the motion to suppress.

The primary case appellant cites, *People v. Neal* (2003) 31 Cal.4th 63, does not convince us that a contrary conclusion is appropriate. In *Neal*, our high court was faced with truly extraordinary circumstances. There, a law enforcement officer threatened the defendant and intentionally continued to question him even though he had invoked his right to counsel *nine times.* The officer then placed the defendant in custody overnight without access to counsel, and without food, drink, or toilet facilities. The following morning the defendant was questioned again, and he confessed. (*Id.* at p. 68.) Our Supreme Court ruled that the repeated *Miranda* violations, the threats, and the circumstances of the defendant's confinement combined to render his confession involuntary. (*Id.* at pp. 81-85.) The situation here is vastly different. Appellant

expressly waived his *Miranda* rights, and Sergeant Cruz denied that he threatened appellant in any way. Furthermore, the circumstances of appellant's confinement were much less onerous than those presented in *Neal*. The case is not controlling.

We conclude the trial court correctly denied appellant's motion to suppress.

C. *Batson/Wheeler* Issues

The prosecutor used three of his peremptory challenges to remove African American jurors. Immediately after the third challenge, defense counsel advised the court that he needed to discuss an issue privately. The court made note of counsel's request, but continued with jury selection. Twelve jurors and three alternates were selected.

After jury selection was completed, the court addressed defense counsel's motion. Defense counsel noted that African Americans are a protected class and that the prosecutor had used his challenges to remove three of them. Counsel acknowledged that an African American was on the panel that had been sworn, but he argued that did not "excuse what happened previously . . . ."

The trial court found defense counsel had made a prima facie case. It asked the prosecutor to explain his challenges.

The prosecutor denied using his challenges to remove jurors based on their race. He noted that there was an African American woman on the jury when he passed initially, who the defense had then removed. He also noted there was an African American on the panel that had been sworn. The prosecutor then went on to explain his reasons for excusing the jurors in question. Only two of those explanations are relevant here. The prosecutor stated as follows:

"Regarding Juror No. 20, [J. H.-P.], she was currently a psychology or studying psychology at College of Alameda. She answered in her questionnaire that she would disregard the testimony of a drug user. I anticipate that one of the witnesses I'll be calling in this case will be an admitted drug user.

"She also expressed great displeasure with the police, saying she doesn't believe they have citizens best interests at heart. She said most of her friends have had very

negative experiences with police officers. She said that her ex-boyfriend had a very bad experience with a police officer. And while she said that she felt she could put that aside, I didn't believe that the body language that she was exhibiting in court expressed those views. She had her arms crossed and was not looking directly at me during some of her questioning. She appeared angry to be here and [it] did not appear that she wished to be a juror in this case.

"She also answered in her questionnaire that she felt that African-Americans and minorities are treated differently by the criminal justice system and they're not treated fairly, which leads me cause to believe she may at some point feel some sympathy towards the defendant given this position.

"I believe that's regarding No. 20.

" . . . [R]egarding Miss [V. M.], Juror No. 11, on her questionnaire, when asked do you have any religious beliefs, moral feelings, or philosophical principles that may interfere with your ability to sit in judgment of another person, she checked the box yes and explained that she felt she can't be that sure that a person is innocent or guilty.

"I felt based on her answers, both here an in court, that she would have difficulty in making a decision. And I asked for her to be excused for the same reasons that I had asked prior jurors to be excused based on their similar answer that they did not feel that they could sit or be comfortable sitting in judgment of another person.

"In addition, Miss [M.] disclosed that her son-in-law had been arrested for selling marijuana in Oregon. She answered that she did not think that he was treated fairly by the criminal justice system and she felt that the punishment did not fit the crime. Based on that I did not feel that she would be able to fully put aside the issue of penalty or punishment in this case because of her son-in-law's case.

"Finally, she answered question No. 38 regarding her attitude in general towards law enforcement officers: Sometimes they use too much force and too much – they use too much force, and my impression was that they shoot in some cases where it didn't seem necessary.

"In addition she said that if a person had made a false statement on a previous occasion, she would automatically disregard anything else they had to say. She said that they cannot be trusted to tell the truth if they're doing so under oath.

"As the Court's aware there is going to be a witness that testified under oath at a preliminary hearing that gave testimony that was very different from what he had initially said to the police, and I didn't think that she would be able to fairly judge his testimony.

"Finally, she indicated that it was her belief that African-Americans and other minorities are treated differently by the criminal justice system and that in many cases that's because they don't have the resources to get the best lawyer. And that led me to believe she may at some point develop some sympathy towards the defendant and not be able to put that aside."

The trial court accepted the prosecutors explanations and denied the motion explaining its decision as follows: "All right. Then the Court is satisfied that [the prosecutor] has given nonrace-based reasoning that was very sound for the exclusion of these three potential jurors. So the motion, *Wheeler-Batson* motion was denied."

Appellant now contends his conviction must be reversed because the prosecutor violated *Batson/Wheeler* principles when he used peremptory challenges to remove the two jurors discussed above.

The California and federal Constitutions forbid a prosecutor from excluding prospective jurors for a racially discriminatory purpose. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) A three-step procedure is used to determine whether a prosecutor is exercising his challenges in an improper manner. "'"First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . .

whether the opponent of the strike has proved purposeful racial discrimination.'"""" (*Zambrano, supra*, 41 Cal.4th at p. 1104.)

Our review of the trial court's ruling on a *Batson*/*Wheeler* motion is deferential. (*People v. Lenix* (2008) 44 Cal.4th 602, 626.) It is presumed that the prosecutor uses peremptory challenges in a constitutional manner. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1104.) We review the trial court's ruling on purposeful racial discrimination for substantial evidence. (*Ibid.*)

Here, the trial court found defense counsel had made a prima facie case, and the prosecutor explained to the court why he challenged the jurors in question. Therefore, under the principles set forth above, we must determine whether substantial evidence supports the trial court's ruling that the prosecutor did not engage in purposeful discrimination. "[T]he critical question in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339.) The credibility of a prosecutor's stated reasons "can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Id*. at p. 339.)

Here, several race-neutral reasons indicated that V. M. would not have been a desirable juror for the prosecution. V. M. apparently had indicated on her questionnaire that she had religious beliefs that might interfere with her ability to sit in judgment of another person.[3] The prosecutor and defense counsel *both* challenged other jurors who had provided similar answers. V. M. also indicated to the court that her son-in-law had been arrested for selling marijuana in Oregon and that he did not believe he was treated fairly. The prosecutor could reasonably question whether V. M. would be an ideal juror given negative experience of a close relative. V. M. apparently stated in her questionnaire that the police use too much force sometimes and they shoot when it is not

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[3] We say apparently because the trial court did not retain the questionnaires of the jurors who were not seated. Appellant has taken the position that the prosecutor's representations must have been accurate because defense counsel did not object.

necessary. Given the large part that police questioning played in this case, it was reasonable for the prosecutor to be wary of a juror who held negative views of the police. V. M. apparently said in her questionnaire that she would disregard the testimony of a person who had testified falsely on a prior occasion. One of the prosecution's primary witnesses, Michael Tafoya, had testified evasively at the preliminary hearing. Finally, V. M. apparently had indicated in her questionnaire that African-Americans and other minorities are treated differently by the criminal justice system because they do not have enough money to retain a good lawyer. The prosecutor reasonably could conclude that a juror who holds those views might develop sympathy for appellant that she would be unable to put aside.

In sum, we conclude the prosecutor provided several reasons, unrelated to race that would support the conclusion that V. M. would not be a good juror from his perspective.

None of the arguments appellant makes convince us the prosecutor's challenges were pretextual. First, appellant argues the trial court's finding of no discrimination is not entitled to deference because the court did not explain its reasons fully. It is true that a finding of no discrimination is entitled to deference "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal.4th 345, 386.) However, the trial court is not required to address each stated justification at length. "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*Ibid.;* see also *People v. Reynoso* (2003) 31 Cal.4th 903, 929.) The explanations the prosecutor provided here were reasonable, and to the extent we can determine, they are supported by the record. The court's finding is entitled to deference.

Next, appellant notes that many of the characteristics cited by the prosecutor were when explaining his challenge of V. M. were shared by other jurors who actually served. For example, jurors 1, 6, and 7 also indicated they had reservations about sitting in judgment of others. Juror 8 also had a relative who had a negative experience with the

criminal justice system. Jurors 1, 2, 4, 7, and 10 also indicated they would disregard the statement of a witness who had testified falsely on a prior occasion. Juror 9 also said he held negative views of the police. Jurors 7 and 9 and alternate jurors 1 and 2 also said minorities were treated differently by the criminal justice system. According to appellant, this "comparative juror analysis" plainly demonstrates that the prosecutor's challenge of V. M. was pretextual.

Appellant never raised this issue in the trial court, however, our Supreme Court has said the issue may be raised for the first time on appeal "if . . . the record is adequate to permit the urged comparisons." (*People v. Lenix, supra*, 44 Cal.4th at p. 622.) We question whether that is the case here. As we have stated, we do not have the questionnaire that was completed by V. M., and we can only infer her responses based on the reasons the prosecutor stated in open court.

Furthermore, our Supreme Court has recognized the "inherent limitations" of trying to conduct a comparative analysis based on a cold appellate record. (*People v. Lenix, supra*, 44 Cal.4th at p. 622.) "In the trial court . . . advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact . . . [¶] . . . [¶] For these reasons, comparative juror evidence is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard." (*Id.* at pp. 622-624.)

Turning to the merits, appellant's use of a comparative juror analysis does not persuade us that the trial court erred in denying the *Batson/Wheeler* motion. It is clear from the prosecutor's explanation that he did not rely on any single circumstance when he excused V. M. It is also clear that none of the seated jurors had the same combination of characteristics as V. M. "While an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer. Likewise, reviewing courts should not do so." (*People v. Lenix, supra*, 44

Cal.4th at p. 631, fn. omitted.) Here, for example, juror 1 shared two of the characteristics that the prosecutor cited when excusing V. M. However, juror 1 also stated in her questionnaire that "murder should be punished so the society will be peaceful." The prosecutor may well have believed that juror 1's belief that murder should be punished made her a desirable juror in a murder case even though she had given other responses that could be viewed as negative. Similarly, juror 7 shared three of the characteristics that the prosecutor cited when excusing V. M. However, juror 7, also said he viewed law enforcement officers positively and that he "appreciate[d] them doing that kind of work. Given the pivotal role that law enforcement personnel were to play in this case, the prosecutor may well have concluded that juror 7's positives outweighed his negatives. In sum, a comparative analysis does not convince us that the prosecutor used his peremptory challenges improperly.

Next, appellant argues that the prosecutor mischaracterized V. M.'s views when explaining why he challenged her. Specifically, appellant notes the prosecutor said he challenged V. M. because *she* believed her son-in-law had been treated unfairly when he was arrested previously. Appellant says that is a misstatement because V. M. merely said her *son-in-law* believed he had been treated unfairly. Again, we do not have V. M.'s questionnaire so we do not know precisely how she responded to the question at issue. In any event, it would not have been unreasonable for the prosecutor to infer that V. M. had internalized the views that had been expressed by her close relative. The point is minor and does not demonstrate prejudice.

Appellant next notes that the prosecutor did not even question juror 1 on his response that he had religious, moral, or philosophical beliefs that would make it difficult for him to sit in judgment of others. Appellant argues this failure demonstrates prejudice. While the United States Supreme Court has stated that the "'State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination,'" (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246) our own Supreme Court has indicated that that factor is not determinative. (See, e.g., *People v. Huggins* (2006) 38 Cal.4th 175,

234-236 [finding no discrimination even though no voir dire had been conducted on the ground the prosecutor cited to support his challenge].) Here, the prosecutor may well have concluded that juror 1's positive characteristics outweighed her negative responses and that it was unnecessary to voir dire her on the point. We find no discrimination on this ground.

Turning to juror J. H.-P., the prosecutor stated four race-neutral reasons why she would not be a desirable juror: (1) she apparently stated in her questionnaire that she would disregard the testimony of a drug dealer,[4] (2) she believed the criminal justice system treated African-Americans differently, (3) she expressed displeasure with the police, and (4) her "body language" and demeanor indicated she was "angry to be here[.]" The first three factors were similar to the reasons the prosecutor cited when challenging V. M. The same conclusions we reached as to V. M. apply to J. H-P. As for J. H.P.'s body language and attitude, that type of subjective factor is precisely why a trial court's ruling is entitled to deference on appeal. (See *Snyder v. Louisiana* (2008) 128 S.Ct. 1203, 1208.)

We conclude substantial evidence supports the trial court's conclusion that the prosecutor was not exercising his peremptory challenges in a discriminatory way. The court correctly denied appellant's *Batson/Wheeler* motion.

D. Cruel and Unusual Punishment

The trial court sentenced appellant to 25 years to life in prison. Appellant now contends his sentence must be reversed because it constituted cruel and unusual punishment.

Appellant never raised this issue in the court below. He has forfeited the right to raise it on appeal. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) We also reject the argument on its merits.

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[4] Again, we say apparently because J. H-P.'s questionnaire is not included in the record on appeal.

A sentence violates the Eighth Amendment of the United States Constitution if it is "grossly out of proportion to the severity of the crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) However, the protection afforded by the Eighth Amendment is narrow. It applies only in the "'exceedingly rare'" and "'extreme'" case. (*Ewing v. California* (2003) 538 U.S. 11, 21 (plur. opn. of O'Connor, J.), quoting *Rummel v. Estelle* (1980) 445 U.S. 263, 272, 274, fn. 11.) We are not convinced this is such a case.

The United States Supreme Court has held that lengthy and even life sentences for nonviolent crimes do not constitute cruel and unusual punishment. (See, e.g., *Harmelin v. Michigan* (1991) 501 U.S. 957, 966-994 [life without parole found not to be disproportionate for possession of a large quantity of drugs]; *Rummel v. Estelle, supra,* 445 U.S. at p. 285 [life sentence upheld for a nonviolent recidivist].) If a sentence of life without parole is not considered cruel and unusual for nonviolent offenses, we are not inclined to find a sentence of life with the possibility of parole disproportionate for a crime that resulted in death—even if that death was an unintentional one that occurred during the commission of a robbery. (*People v. Lewis* (2004) 120 Cal.App.4th 837, 855.)

Turning to California law, a sentence violates the California Constitution if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) "The main technique of analysis under California law is to consider the nature both of the offense and of the offender." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

Here, appellant actively participated in a robbery that resulted in the death of his intended victim. While appellant may have not have intended to participate in a murder and he might not have thrown the fatal blow, the courts of this state have repeatedly upheld similar sentences imposed on defendants who were not the actual killer and who did not intend that their victim be killed. (See *People v. Smith* (1986) 187 Cal.App.3d 666, 683, and cases cited therein; disapproved on other grounds in *People v. Bacigalupo* (1991) 1 Cal.4th 103, 126, fn. 4 and *People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198.)

As for appellant himself, he is an adult and appears to be of at least average intelligence. Further, he does have a criminal history, albeit a minor one. Given the seriousness of the crime that appellant did intend, and the horrible consequences that followed, we conclude the sentence imposed does not shock the conscience nor does it offend fundamental notions of human dignity. (*In re Lynch*, *supra*, 8 Cal.3d at p. 424.)

Appellant contends the facts here are similar to those present in *People v. Dillon* (1983) 34 Cal.3d 441. The defendant in that case was a 17-year-old high school student. He and a group of friends hatched a plan to steal marijuana from two brothers who were growing it on a nearby farm. (*Id.* at p. 451.) Previous attempts to steal from the farm had been unsuccessful, and one of the brothers had told the boys they would be shot if they tried again. (*Id*. at p. 451.) When the boys did try again, they armed themselves. (*Ibid.*) During the attempt, one of the group twice accidentally discharged his shotgun. (*Id*. at p. 452.) Shortly after that, the defendant saw one of the brothers emerging from the bushes carrying a shotgun. (*Ibid*.) As he drew near, the defendant shot him causing fatal wounds. (*Id.* at p. 452.) The defendant testified, credibly, that he believed the shotgun blasts he heard had been fired at his friends and that he began firing at the man approaching him because he panicked and was afraid of being shot. (*Id*. at pp. 482-483.) A clinical psychologist testified that the defendant was unusually immature. (*Id.* at p. 483.) The defendant had no previous criminal record, and the trial court had found that he was not a dangerous person. (*Id*. at pp. 486, 488.) On those unusual facts, our Supreme Court ruled that punishing the defendant as a perpetrator of first degree murder violated the state Constitution. (*Id.* at p. 489.)

The facts here are distinguishable. Appellant was 20 years old when he committed this crime and he does not appear to have been immature for his age. Furthermore, there is no evidence that Briggs was armed or that appellant was acting in self-defense. *Dillon* is not controlling under these very different facts.

Finally, appellant contends the sentence he received was invalid because Roberts who threw the fatal blow, pleaded guilty to manslaughter and received only an 11-year sentence. He again relies on *People v. Dillon*, *supra*, 34 Cal.3d 441, where our Supreme

Court ruled the sentence under review was excessive after comparing the sentence imposed on others who had participated in the attempted robbery. However, in *Dillon* none of the other defendants had been convicted of any degree of homicide and they received sentences that amounted to "the proverbial slap on the wrist." (*People v. Dillon, supra,* 34 Cal.3d at p. 488.) Here, Roberts was convicted of manslaughter and he received a lengthy 11-year sentence. Again, *Dillon* is not controlling when faced with these very different facts.

We conclude appellant's sentence was not cruel and unusual punishment.[5]

III. DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

_____

Bruiniers, J.

[5] Having reached this conclusion, we need not determine whether appellant's trial counsel was ineffective because he failed to raise this issue in the court below.